Supreme Court, U.S.
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No. _____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1995

GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Petitioner,

v.

RONALD P. REED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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42 pp

QUESTION PRESENTED

The Texas courts long have held that claims of error in voir dire, including violations of *Swain v. Alabama*, 380 U.S. 202 (1965), are waived if the voir dire proceedings are not included in the appellate record. Was this state procedural rule firmly established, so as to constitute an adequate and independent state ground on federal habeas corpus review, when the state court of appeals applied it and refused to consider the merits of Reed's claim of a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVES	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
THE JUDGMENT OF THE COURT BELOW IS CONTRARY TO THIS COURT'S PRECEDENT AND GROSSLY VIOLATES THE EQUITABLE NATURE OF HABEAS CORPUS.	4
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	Page
Allen v. State, 753 S.W.2d 792 (Tex. App.--Beaumont 1988, no pet.)	8
Allen v. State, 722 S.W.2d 514 (Tex. App.--Beaumont 1986)	8
Bass v. Estelle, 705 F.2d 121 (5th Cir.), *cert. denied*, 464 U.S. 865 (1984)	9
Batson v. Kentucky, 476 U.S. 79 (1986)	*passim*
Davis v. State, 478 S.W.2d 958 (Tex. Crim. App. 1972)	7
Dugger v. Adams, 489 U.S. 401 (1989)	9
Easter v. Estelle, 37 F.3d 1343 (8th Cir. 1994)	5
Enoch v. Gramley, 70 F.3d 1490 (7th Cir. 1995)	9
Ford v. Georgia, 498 U.S. 411 (1991)	4, 5, 7
Forgy v. Norris, 64 F.3d 399 (8th Cir. 1995)	5
Gaines v. State, 479 S.W.2d 678 (Tex. Crim. App. 1972)	6
Grinage v. State, 634 S.W.2d 863 (Tex.App.--San Antonio 1982)	7
Hansbrough v. Latta, 11 F.3d 143 (11th Cir. 1994)	5

Harris v. State, 656 S.W.2d 481
(Tex. Crim. App. 1983) 6

James v. Kentucky, 466 U.S. 341 (1984) 5

Johnson v. State, 651 S.W.2d 303
(Tex. App.--San Antonio 1983) 7

Longs v. State, 429 S.W.2d 157
(Tex. Crim. App. 1968) 7

Lopez v. State, 463 S.W.2d 448
(Tex. Crim. App. 1971) 7

McKinney v. State, 744 S.W.2d 252
(Tex. App.--Waco 1987, no pet.) 6, 8

Parks v. State, 437 S.W.2d 554
(Tex. Crim. App. 1969) 7

Reed v. Scott, 70 F.3d 844 (5th Cir. 1995) 2, 6, 9

Reed v. State, 751 S.W.2d 607
(Tex. App.--Dallas 1988, no pet.) 2, 3, 7

Reese v. State, 481 S.W.2d 841
(Tex. Crim. App. 1972) 6

State v. Sparks, 355 S.E.2d 658 (Ga. 1987) 4, 5

Swain v. Alabama, 380 U.S. 202 (1965) 6, 7, 8

Wainwright v. Sykes, 433 U.S. 72 (1977) 2

Warner v. United States, 975 F.2d 1207
(6th Cir. 1992) 5

TABLE OF AUTHORITIES, continued

Statutes	Page
28 U.S.C. § 1254(1)	2

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v.

RONALD P. REED,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Gary L. Johnson, Director, Texas Department of Criminal Justice, Institutional Division,[1] by and through his attorney, the Attorney General of Texas, and files this Petition for Writ of Certiorari.

[1]For clarity, the Petitioner will be referred to as "the Director," and the Respondent as "Reed."

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit reversing the judgment of the federal district court and remanding is reported as *Reed v. Scott*, 70 F.3d 844 (5th Cir. 1995), and is attached to this petition as Appendix A. The final judgment and order of the district court adopting a magistrate judge's report and recommendation and denying habeas corpus relief are attached as Appendix B. The magistrate judge's report and recommendation is attached as Appendix C. The opinion of the state court of appeals affirming Reed's conviction is reported as *Reed v. State*, 751 S.W.2d 607 (Tex. App.--Dallas 1988, no pet.), and is attached as Appendix D.

JURISDICTION

This petition for writ of certiorari is filed within ninety days after the court below issued its opinion on December 18, 1995. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the court below's misapplication of this Court's decisions construing the procedural default doctrine enunciated in *Wainwright v. Sykes*, 433 U.S. 72 (1977). No constitutional or statutory provision is involved.

STATEMENT OF THE CASE

The Director has lawful and valid custody of Reed pursuant to a judgment and sentence of the 194th District Court of Dallas County, Texas, in Cause No. F85-92676-PM, styled *The State of Texas v. Ronald P. Reed.* Reed was charged with the first-degree felony offense of aggravated sexual assault. He entered a plea of not guilty and was tried by a jury, which on

April 14, 1986, found him guilty and assessed punishment of imprisonment for life and a $10,000 fine.

Reed's conviction was affirmed by the Fifth Court of Appeals of Texas on May 10, 1988. *Reed v. State*, 751 S.W.2d 607 (Tex. App.--Dallas 1988, no pet.). App. D. The state court of appeals, relying on venerable Texas precedent, held that Reed was not entitled to review of his claim that a prospective juror was excluded in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986), because the voir dire examination of the jury panel had not been transcribed and made part of the appellate record. App. D 4. Reed did not file a petition for discretionary review by the Texas Court of Criminal Appeals. Reed has filed one state application for writ of habeas corpus challenging this conviction. It was denied without written order on October 14, 1992. *Ex parte Reed*, No. 23,994-01.

After having exhausted his state remedies, Reed filed a federal petition for writ of habeas corpus in which he presented his *Batson* claim, *inter alia*. A United States magistrate judge recommended that all relief be denied and that the *Batson* claim not be reviewed because Reed had procedurally defaulted it as a matter of state law by not having a transcription of the voir dire included in the record on appeal. App. C 3-4. The federal district court adopted the magistrate judge's recommendation and denied the writ. App. B.

On appeal, the court below affirmed the district court's denial of relief on Reed's other claims but reversed and remanded for consideration of the merits of the *Batson* claim. The Fifth Circuit found that the state courts' invocation of a procedural bar was not entitled to the respect of a federal habeas court because it was not "firmly established and regularly followed" at the time it was applied. App. A 5.

REASONS FOR GRANTING THE WRIT

THE JUDGMENT OF THE COURT BELOW IS CONTRARY TO THIS COURT'S PRECEDENT AND GROSSLY VIOLATES THE EQUITABLE NATURE OF HABEAS CORPUS.

Seldom will the Court be presented with a decision of a federal court of appeals that is so manifestly incorrect. The judgment of the Fifth Circuit cannot be squared with *Ford v. Georgia*, 498 U.S. 411, 424 (1991), and other decisions of this Court that govern application of the procedural default doctrine in habeas corpus cases. More fundamentally, the court below disposed of Reed's appeal in a manner that is inconsistent with the equitable nature of the Great Writ and--consideration of legal principles aside--is plainly wrong as a matter of simple logic. Finally, the harm that will flow from this decision is not limited to the facts of this case or even the precise constitutional violation alleged by Reed; instead, if left to stand, the Fifth Circuit's judgment will unfairly deprive habeas corpus respondents of valid procedural bars to a variety of claims. On this record, summary reversal is appropriate.

This case presents the mirror image of *Ford v. Georgia*. In *Ford*, the Georgia Supreme Court refused to consider the merits of Ford's claim that the prosecutor at his criminal trial exercised his peremptory challenges in violation of *Batson v. Kentucky*. The state high court held that Ford's claim was procedurally barred under *State v. Sparks*, 355 S.E.2d 658, 659 (Ga. 1987), because he did not make a contemporaneous objection to his jury after it was selected and before the trial commenced. The Court granted certiorari "to decide whether the rule of procedure laid down by the Supreme Court of Georgia in *Sparks* was an adequate and independent state procedural ground that would bar review of petitioner's *Batson* claim." 498 U.S. at 418.

A unanimous Court reversed. Citing *James v. Kentucky*, 466 U.S. 341, 348 (1984), the Court found that the Georgia rule was not a "firmly established and regularly followed state practice." Because *Sparks* was decided after Ford's trial and, by its very terms, was to apply prospectively, its retroactive application to Ford's case "would therefore apply a rule unannounced at the time of petitioner's trial and consequently inadequate to serve as an independent state ground within the meaning of *James*." 498 U.S. at 424. Thus, "[t]he *Sparks* rule, adopted long after petitioner's trial, cannot bar federal judicial review of petitioner's equal protection claim." *Id.* at 425.

The correctness of *Ford* is readily apparent,[2] just as is the unfairness of the Fifth Circuit's decision here. While acknowledging that "Texas law precludes review of an alleged voir dire error if the defendant fails to provide a sufficient record from which the court may discern such error," App. A 4, the court below found that the Texas courts never had applied this bar to a *Batson* claim because "*Reed* is the first reported decision in which a Texas appellate court refused to reach a

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[2]The courts of appeals have consistently followed *Ford* in finding that various state procedural rules were not firmly established. *See, e.g., Forgy v. Norris*, 64 F.3d 399, 402 (8th Cir. 1995) (defendant did not forfeit claim even though *pro se* brief was not included in appellate record; under Arkansas practice, brief was "filed" when handed to the trial judge and was required to be included in record, and defendant could not foresee that Arkansas Supreme Court would refuse to consider his motion); *Easter v. Estelle*, 37 F.3d 1343, 1345-46 (8th Cir. 1994) (no procedural default due to defendant's failure to raise claim in state post-conviction petition where that remedy did not exist at time of conviction and was not extended to those similarly situated to petitioner until after time for filing petition had passed); *Hansbrough v. Latta*, 11 F.3d 143, 146 (11th Cir. 1994) (Alabama Court of Criminal Appeals' striking of defendant's notice of appeal was not based on firmly established rule because Alabama "has no [such] rule at all"); *Warner v. United States*, 975 F.2d 1207, 1213-14 (6th Cir. 1992) (defendant's failure to raise claim of ineffective assistance of counsel on direct appeal did not constitute a procedural default because rule requiring such claims to be raised on direct appeal was not established until two years later).

Batson claim because the defendant failed to provide a complete voir dire transcript." *Id.* at 5. In fact, this is not the case. In *McKinney v. State*, 744 S.W.2d 252, 256 (Tex. App.--Waco 1987, no pet.), decided some five months earlier, another state court of appeals held that appellate consideration of a *Batson* claim was barred because the defendant did not provide a record that was "sufficiently complete to demonstrate error."[3] Pointedly, the *McKinney* court noted that "[n]either the holding in *Batson* nor any decision by the Court of Criminal Appeals interpreting *Batson* negate this basic rule of appellate procedure." *Id. McKinney* demonstrates that *Reed* was not the first reported Texas decision to find that a *Batson* claim was procedurally barred on this basis.

Even absent consideration of *McKinney*, however, it is clear that this rule was firmly established prior to the disposition of Reed's appeal. That this is so is demonstrated by the Texas Court of Criminal Appeals' refusal to consider *Swain*[4] claims where the voir dire was not transcribed and included in the record on appeal. For instance, in *Reese v. State*, 481 S.W.2d 841, 842 (Tex. Crim. App. 1972), the court refused review of a *Swain* claim because "[t]he voir dire examination of the jury panel is not included in the record nor does the record reflect a request that such voir dire examination be taken by the court reporter." *See also Harris v. State*, 656 S.W.2d 481, 486 (Tex. Crim. App. 1983) (refusing to reach merits of claim that blacks were improperly excluded from jury because defendant's brief was inadequate and because "the record contains no indicia in any form of the racial composition of the jury"); *Gaines v. State*, 479 S.W.2d 678, 679 (Tex. Crim. App. 1972) (refusing review of similar claim because "[t]here is nothing in the record, neither by inclusion of the jury selection list showing the peremptory

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[3]Neither the state court of appeals that decided Reed's appeal nor the Fifth Circuit adverted to the *McKinney* decision.

[4]*Swain v. Alabama*, 380 U.S. 202 (1965).

challenges nor by a formal bill of exceptions or by any other method to sustain this contention"); *Davis v. State*, 478 S.W.2d 958, 959 (Tex. Crim. App. 1972) (refusing review of similar claim because "[t]he record was not developed on this ground of error and nothing is presented for review").[5]

Ford teaches that

> [b]ecause *Batson* did not change the nature of the violation recognized in *Swain*, but merely the quantum of proof necessary to substantiate a particular claim, it follows that a defendant alleging a violation of equal protection of the law under *Swain* necessarily states an equal protection violation subject to proof under the *Batson* standard of circumstantial evidence as well.

498 U.S. at 420. Further,

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[5]In addition to claims of racial discrimination in jury selection, various other contentions have been found to be barred due to an insufficient voir dire record. *E.g.*, *Reed v. State*, 500 S.W.2d 497, 500 (Tex. Crim. App. 1973) (persons systematically excluded because of religious beliefs); *Lopez v. State*, 463 S.W.2d 448-49 (Tex. Crim. App. 1971) (prejudicial statement made by venire member); *Parks v. State*, 437 S.W.2d 554, 557 (Tex. Crim. App. 1969) (systematic exclusion of venire members who did not believe in death penalty); *Longs v. State*, 429 S.W.2d 157, 158 (Tex. Crim. App. 1968) (undue limitation of defense counsel's examination of jury panel); *Johnson v. State*, 651 S.W.2d 303, 318 (Tex. App.--San Antonio 1983) (jury selection process provided in statute governing capital felonies denied defendant due process); *Grinage v. State*, 634 S.W.2d 863, 867 (Tex.App.--San Antonio 1982) (prejudicial statement by prosecutor during voir dire). *See also* cases cited by the Fifth Circuit. App. A 4 n. 13.

> [b]ecause *Batson* merely modified the allegations and evidence necessary to raise and prove the equal protection claim in question, it would be reasonable to conclude that the state court's concession of timeliness under *Swain* must govern its treatment of the *Batson* claim as well.

Id. at 421-22.

Inasmuch as Texas law long has provided that *Swain* claims cannot be reviewed absent a record of the voir dire, it necessarily follows that *Batson* claims likewise cannot. Thus, the procedural bar imposed in Reed's appeal was "firmly established" regardless whether it previously had been applied in *McKinney*. The Fifth Circuit's contrary conclusion is plainly wrong.

Two further points bear mentioning. The court below dismissed as "inapposite" subsequent Texas decisions in which *Batson* claims were found to be barred for lack of a voir dire record. App. A 5-6. Although these authorities may not satisfy the "firmly established" prong of *Ford*, they certainly show that the rule has been regularly followed.

While the Fifth Circuit attached no importance to these cases, it did cite a later case, *Allen v. State*, 753 S.W.2d 792 (Tex. App.--Beaumont 1988, no pet.), as showing that the rule has not been strictly followed. In *Allen*, originally decided shortly after *Batson*, the defendant's jury selection claim initially was rejected on the basis that *Batson* was not retroactive. *Id.* at 793, citing *Allen v. State*, 722 S.W.2d 514 (Tex. App.--Beaumont 1986). The Court of Criminal Appeals remanded to the court of appeals with instructions to abate the appeal so that the trial court could hold a *Batson* hearing. *Allen*, 753 S.W.2d at 793. There is no indication that the state ever raised the

procedural bar at issue here or that the Court of Criminal Appeals considered it, and the court of appeals opined that were it writing on a "clean slate," it would apply the bar. *Id.* Thus, *Allen* represents nothing more than an instance in which the Texas courts failed to consider a defense that the state never urged. *Cf. Dugger v. Adams*, 489 U.S. 401, 410 n. 6 (1989) (Florida state court decision was "not clear" as to whether claim "was or was not procedurally barred").

In any event, even if *Allen* is read as it was by the court below, it does not undermine the adequacy of this rule. Under *Dugger v. Adams*, isolated state court decisions that fail to invoke a procedural bar are not "sufficient to undercut the adequacy of the . . . procedural rule." *Id. See also Enoch v. Gramley*, 70 F.3d 1490, 1501 (7th Cir. 1995) (decision failing to apply procedural bar "merely showed that the Illinois Supreme Court might, in some circumstances, forgive the forfeiture. The Illinois Supreme Court is allowed to forgive without at the same time creating a right to forgiveness"). Given the longstanding nature and widespread application of the Texas rule, a single reported decision to the contrary cannot render it invalid. Indeed, the Fifth Circuit itself recognized more than ten years ago that an occasional act of grace excusing a procedural default does not constitute failure to strictly or regularly follow state procedural rules. *Bass v. Estelle*, 705 F.2d 121, 122-23 (5th Cir.), *cert. denied*, 464 U.S. 865 (1984).

Finally, this case warrants review because the harm engendered by the court below's decision extends far beyond its application to *Batson* claims. For instance, it long has been the rule in Texas that a contemporaneous trial objection is required to preserve error regarding the admission of evidence. Under *Reed v. Scott*, if the state seeks to introduce evidence produced by previously unavailable scientific means, such as DNA testing, and the defendant does not object, the state courts' imposition of a procedural bar will not be honored by the Fifth Circuit because that precise evidentiary issue never had arisen before, and therefore the bar was not "firmly established." Such a perverse

result is inimical to the equitable principles that govern federal habeas corpus practice. This Court should grant certiorari and summarily reverse the judgment of the court below.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the writ of certiorari to the Court of Appeals for the Fifth Circuit issue and that this cause be reversed.

Respectfully submitted,

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APPENDIX A

RONALD P. REED, Petitioner-Appellant,
v.
WAYNE SCOTT, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellee.

No. 95-10078.

United States Court of Appeals,
Fifth Circuit.

Dec. 18, 1995

Ronald P. Reed, Tennessee Colony, TX, pro se.

Charles A. Palmer, Dan Morales, Attorney General, Office of the Attorney General for the State of Texas, Austin, TX, for respondent-appellee.

Appeal from the United States District Court for the Northern District of Texas.

Before POLITZ, Chief Judge, and HILL[FN*] and DeMOSS, Circuit Judges.

POLITZ, Chief Judge:

Ronald P. Reed appeals the denial of his petition for the writ of habeas corpus. For the reasons assigned we reverse and remand.

BACKGROUND

In 1986 Ronald P. Reed was convicted in Texas state court of aggravated sexual assault and sentenced to life in

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[FN*] Circuit Judge for the Eleventh Circuit, sitting by designation.

prison. Reed's conviction was affirmed on direct appeal.[1] In affirming his conviction the court of appeals declined to reach the merits of his Batson[2] claim because Reed failed to provide a complete transcript of the voir dire examination.[3] The court of appeals based its conclusion on the "well settled [rule] that complaints as to voir dire error cannot be reviewed in the absence of a transcription of the complete voir dire examination."[4] A complete transcription of the voir dire examination does not exist because Reed's counsel informed the trial court that he did not desire the court reporter to make such a record.[5] The questioning of some panel members, however, was recorded and there is a transcript of the Batson hearing.

Reed did not file a petition for discretionary review by the Court of Criminal Appeals but, rather, filed a state petition for the writ of habeas corpus in accordance with Tex. Code Crim. Proc. Ann. art. 11.07, alleging the Batson claim. The Court of Criminal Appeals denied the petition without written

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[1] *Reed v. State*, 751 S.W.2d 607 (Tex.App.--Dallas 1988, no pet.).

[2] *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

[3] Reed.

[4] *Id.* at 610.

[5] Tex. Code Crim.Proc.Ann. art. 40.09 § 4 (West 1979) (repealed) states, in relevant part, "[a]t the request of either party the court reporter shall take short-hand notes of all trial proceedings, including voir dire examination...." This provision of the Texas Code of Criminal Procedure has been repealed and replaced, effective September 1, 1986, by Tex.R.App.Proc. 50. *Emery v. State*, 800 S.W.2d 530 (Tex.Cr.App. 1990) (en banc). Nevertheless it applies to the defendant's obligation to request the court reporter to take short-hand notes of voir dire because the trial was completed before the effective date of Tex.R.App.Proc. 50. *Id.* However, Tex.R.App.Proc. 50(d), which states "[t]he burden is on the appellant ... to see that a sufficient record is presented to show error requiring reversal," applies to the filing of the statement of facts, which were filed on September 12, 1986, and the transcript, which was filed on October 20, 1986. *Id.* at 531 & n. 2 (internal quotations omitted) ("[A]ppellate procedures and steps completed or required to have been completed on or after September 1, 1986, shall be governed by the procedural requirements of the Texas Rules of Appellate Procedures in criminal cases, regardless of when notice of appeal was given.").

order. Having fully exhausted his state remedies, Reed filed the instant petition for the writ of habeas corpus advancing the Batson claim. The petition was referred to a magistrate judge who issued a report and recommendation concluding that the petition should be denied because Reed procedurally defaulted on the Batson claim. The district court adopted the report and recommendation and denied the petition. Reed filed a motion for CPC which we granted.

ANALYSIS

A federal court will not review a question of federal law decided by a state court if its decision rests on a state ground, either substantive or procedural, that is independent of the merits of the federal claim and is adequate to support the judgment.[6] A state ground is "independent" if the last reasoned state court opinion[7] clearly and expressly indicates that its judgment is independent of federal law.[8] A state procedural rule is adequate only if it was firmly established at the time it was applied.[9] Moreover, it must be "strictly or regularly followed by the cognizant state court ... [and] strictly or regularly applied evenhandedly to the vast majority of similar claims."[10]

The issue presented in this case is whether the state procedural rule relied on by the court of appeals in *Reed* is adequate.[11] This is a question of law that we review de novo.[12] Respondent maintains that Texas courts regularly refuse to reach alleged voir dire errors where the defendant fails to provide a complete voir dire transcript. Respondent cites four Court of

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[6] *Amos v. Scott*, 61 F.3d 333 (5th Cir. 1995).

[7] *Ylst v. Nunnemaker*, 501 U.S. 797, 111 S.Ct. 2590, 115 L.Ed.2d 706 (1991).

[8] *Amos*.

[9] *Ford v. Georgia*, 498 U.S. 411, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991).

[10] *Amos*, 61 F.3d at 339 (emphasis in original).

[11] The court of appeals in Reed clearly and expressly indicated that its judgment is independent of federal law. *See Reed*.

[12] *Amos*.

Criminal Appeals cases to support his position.[13] In each of these cases, the Court of Criminal Appeals held that the appellant's argument concerning voir dire error must fail because he did not supply a complete transcript of voir dire. A close examination of these cases, as well as *Payton v. State*,[14] reveals that Texas law precludes review of an alleged voir dire error if the defendant fails to provide a sufficient record from which the court may discern such error rather than absolutely precluding review of an alleged voir dire error absent a complete transcription of the voir dire examination.[15]

The cases relied upon by respondent do not control the resolution of this matter because we must focus on the application of the bar in the context of a Batson claim. This narrow focus is mandated by the claim specific nature of the procedural bar and our statement in *Amos* that in order to

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[13] *See e.g., Burkett v. State*, 516 S.W.2d 147 (Tex. Crim.App. 1974) (restriction of voir dire questioning unreviewable absent entire record of voir dire); *Graves v. State*, 513 S.W.2d 57 (Tex.Crim.App. 1974) (prosecutor's improper remarks unreviewable absent entire voir dire record); *Magee v. State*, 504 S.W.2d 849 (Tex. Crim.App. 1974) (court cannot determine whether a juror improperly concealed bias in absence of complete record of voir dire); *Guerrero v. State*, 487 S.W.2d 729 (Tex. Crim. App. 1972) (whether court erred by refusing to excuse members of venire for bias may not be determined without complete voir dire transcript).

[14] 572 S.W.2d 677 (Tex. Crim. App. 1978). In *Payton*, the court stated "when the issue concerns denial of a challenge for cause or exclusion of a qualified venireman, only the examination of the individual venireman need be in the record." *Id.* at 680. The court also distinguished Burkett and other cases which require a complete voir dire transcript to reach an alleged voir dire error. *Id.*

[15] *See* Tex.R.App.Proc. 50(d) (appellant must provide a sufficient record from which to discern error); see also Tex. Code Crim. Proc. Ann. art 40.09 (West 1979) (repealed). Despite its broad statement concerning the "well settled rule" that a court may not reach a voir dire error without a complete voir dire transcript, the court in Reed implicitly recognized the claim specific nature of the procedural bar by reaching the merits of Reed's point of error concerning a challenge for cause despite the lack of a complete transcription of voir dire.

determine the adequacy of a procedural bar we must emphasize the application of the bar to the specific constitutional claim at issue.[16]

Reed is the first reported decision in which a Texas appellate court refused to reach a Batson claim because the defendant failed to provide a complete voir dire transcript. As such, the court of appeals' refusal to reach Reed's Batson claim due to his failure to provide a complete voir dire transcript "does not even remotely satisfy the requirement ... that an adequate and independent state procedural bar to the entertainment of constitutional claims must have been 'firmly established and regularly followed' by the time" it was applied.[17] Moreover, the authority cited by the respondent indicating that Reed's application of the procedural bar has been followed by other courts of appeal[18] is inapposite because the subsequent

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[16] *Amos. See also Andrews v. Deland*, 943 F.2d 1162, 1190 (10th Cir. 1991) ("The test ... is whether the [state] courts' actual application of the procedural default rule to all similar claims has been evenhanded in the vast majority of cases."), *cert. denied*, 502 U.S. 1110, 112 S.Ct. 1213, 117 L.Ed.2d 451 (1992); *Dugger v. Adams*, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989) (concluding that state court faithfully applied its procedural bar to vast majority of cases raising same type of constitutional claim).

[17] *Ford*, 498 U.S. at 424, 111 S.Ct. at 857-58.

[18] Only one reported decision, *Guilder v. State*, 794 S.W.2d 765 (Tex.App.--Dallas 1990, no pet.), similarly refuses to reach a Batson claim in the absence of a complete voir dire transcript. Several unpublished opinions (which have no precedential value) have applied this bar. *See e.g., Sturkie v. State*, 1995 WL 496619 (Tex.App.--Houston [1st Dist.] 1995, no pet.); *Smith v. State*, 1995 WL 26805 (Tex.App.--Dallas 1995, pet. ref'd); *Black v. State*, 1993 WL 95856 (Tex.App.--Dallas 1993, no pet.); *Jones v. State*, 1992 WL 296934 (Tex.App.--Houston [14th Dist.] 1992, no pet.); *Brown v. State*, 1992 WL 76538 (Tex.App.--Dallas 1992), aff'd on other grounds, 856 S.W.2d 177 (1993); *Taylor v. State*, 1991 WL 284473 (Tex.App.--Dallas 1991, no pet.); *Wyatt v. State*, 1991 WL 134602 (Tex.App.--Dallas 1991, no pet.). Texas courts have not been universal in refusing to reach a Batson claim in the absence of a complete transcript. In *Allen v. State*, 753 S.W.2d 792 (Tex.App.--Beaumont 1998, no pet.), a Texas appeals court decided the merits of the defendant's Batson claim after

application of a bar does not support the conclusion that it was firmly established at the time Reed was decided.

The judgment appealed is REVERSED and the matter is REMANDED for further proceedings consistent herewith.

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noting the lack of a complete transcript. Similarly in *Gator v. State*, 1992 WL 33163 (Tex.App.--Dallas 1992, pet. ref'd), an unpublished case, a Texas appeals court decided the merits of the defendant's Batson claim despite his failure to provide a complete transcript of voir dire.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RONALD P. REED,
Petitioner

vs.

CIVIL ACTION
3:93-CV-2194-X

JAMES A. COLLINS,
Respondent

ORDER

After making an independent review of the pleadings, files and records in this case, and the Findings, Conclusions and Recommendation of the United States Magistrate Judge, I am of the opinion that the Findings and Conclusions of the Magistrate Judge are correct and they are adopted as the Findings and Conclusions of the Court.

ENTERED this 28th day of December, 1994.

JOE KENDALL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RONALD P. REED

vs. CIVIL ACTION NO.
3:93-CV-2194-X

JAMES A. COLLINS, DIRECTOR
INSTITUTIONAL DIVISION
TEXAS DEPARTMENT OF CRIMINAL
JUSTICE

JUDGMENT

This action came on for consideration by the Court, and the issues having been duly considered and a decision duly rendered,

It is ORDERED, ADJUDGED and DECREED that the petition for a writ of habeas corpus is **DENIED.**

It is FURTHER ORDERED that the Clerk shall transmit a true copy of this Order and the Order adopting the Findings, Conclusions and Recommendation of the United States Magistrate Judge to Plaintiff.

SIGNED AND ENTERED this 28th day of December, 1994.

JOE KENDALL
UNITED STATES DISTRICT JUDGE

APPENDIX C

RONALD P. REED, Petitioner

v. No. 3:93-CV-2194-X

DIRECTOR, TEXAS DEPARTMENT
OF CORRECTIONS, Respondent

FINDINGS, CONCLUSIONS AND RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE

Pursuant to the provisions of Title 28, United States Code, Section 636(b), and an Order of the Court in implementation thereof, subject cause has previously been referred to the United States Magistrate Judge. The findings, conclusions and recommendation of the Magistrate Judge, as evidenced by her signature thereto, are as follows:

Type Case: This is a petition for habeas corpus relief pursuant to Title 28, United States Code, Section 2254.

Parties: Petitioner is a state prisoner confined in the Texas Department of Corrections.

Respondent, James A. Collins, is the Director of the Texas Criminal Justice, Institutional Division.

Statement of the Case: Petitioner, Ronald P. Reed, was convicted by a jury of aggravated sexual assault on April 14, 1986 in the 194th District Court of Dallas County, Texas and received a life sentence and a $10,000 fine. (Cause No. F86-92676-PM). On May 10, 1988, the Texas Court of Appeals, Fifth Supreme Judicial District affirmed. Reed then filed a state petition for a writ of habeas corpus which was denied by the Texas Court of Criminal Appeals without order on October 14, 1992. Based on this state habeas application (No. 23,994-01),

the Court finds that Petitioner has sufficiently exhausted his state remedies and now stands properly before this court.

Petitioner raises only one argument in his federal application for habeas corpus: that his conviction was obtained by action of a petit jury which was unconstitutionally selected and impanelled. Specifically, Mr. Reed asserts that during voir dire proceedings, the state excluded black veniremembers from the jury through use of the peremptory challenge.

The Equal Protection Clause, Fourteenth Amendment of the United States Constitution, prohibits the prosecution's use of peremptory challenges to exclude jurors solely on account of their race. *Batson v. Kentucky*, 476 U.S. 79, 89, 106 S. Ct. 1712, 1719 (1986). However, because the voir dire transcript was not furnished to the state appellate court for review, a necessary procedure in the state court, the *Batson* claim may be barred from consideration because of a procedural default.

A federal court may not review a habeas petitioner's claims when the state courts have denied relief on the claim due to a procedural default based upon independent and adequate state procedural grounds. *Wainwright v. Sykes*, 433 U.S. 72, 87, 97 S. Ct. 2497, 2506, 53 L. Ed. 2d 594, 608 (1977); *Engle v. Isaac*, 456 U.S. 107, 129, 102 S. Ct. 1558, 1572, 71 L. Ed. 2d 783, 801 (1982). Procedural default of a claim in the state system will not bar federal habeas review when the petitioner can show sufficient cause for and prejudice from the default. *Murray v. Carrier*, 477 U.S. 478, 494-495, 106 S. Ct. 2639, 2649, 91 L. Ed. 2d 397 (1986); *Paster v. Lynaugh*, 876 F.2d 1184, 1187 (5th Cir. 1989), *cert. dismissed*, 110 S. Ct. 272 (1989). The independent and adequate state procedural ground must be one which is strictly and regularly followed. *Wheat v. Thigpen*, 793 F.2d 621, 624 (5th Cir. 1986), *cert. denied*, 480 U.S. 930 (1987). A procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering judgment in the case clearly and expressly states that its judgment rests on a state procedural

bar. *Ellis v. Lynaugh*, 873 F.2d 830, 837 (5th Cir.), (quoting *Harris v. Reed*, 489 U.S. 255, 109 S. Ct. 1038, 1043, 103 L. Ed. 2d 308 (1989)), *cert. denied*, 493 U.S. 970 (1989). Even when a state court addresses the merits of a claim as an alternative basis for denying relief, a federal court is bound by the court's reliance on the procedural bar. *Ellis* at 838 (*citing Harris*, 109 S. Ct. 1044, n. 10). Whether the state court opinion relied first on the procedural default and secondly on the merits or first on the merits and later invoked procedural default is of no moment. In either case the claim would be procedurally barred. *Thompson v. Lynaugh*, 821 F.2d 1080, 1082 (5th Cir.) *cert. denied*, 483 U.S. 1035 (1987). The Fifth Circuit upheld a procedural bar to a *Batson* claim in *Wiley v. Puckett*, 969 F.2d 86, 101-103 (5th Cir. 1992).

Applying the foregoing principles to the instant case, Petitioner's *Batson* claim is procedurally barred. The language of the Court of Appeals in rejecting Petitioner's *Batson* claim, in relying on settled Texas authority, sets forth that his claim cannot be considered due to the lack of a complete voir dire transcript:

> It is well settled that complaints as to voir dire error cannot be reviewed in the absence of a transcription of the complete voir dire examination. See *Burkett v. State*, 516 S.W.2d 147, 150 (Tex. Crim. App. 1974) (restriction of voir dire questioning unreviewable absent entire record of voir dire); *Graves v. State*, 513 S.W.2d 57, 62 (Tex. Crim. App. 1974) (prosecutor's improper remarks unreviewable absent entire record of voir dire); *Magee v. State*, 504 S.W.2d 849, 852 (Tex. Crim. App. 1974) (cannot determine whether juror improperly concealed bias in absence of entire record of voir dire); *Guerrero v. State*, 487 S.W.2d 729, 731 (Tex. Crim. App. 1972) (whether court erred in refusing to excuse five veniremen who allegedly

showed bias cannot be determined in absence of transcription of voir dire).

Reed v. State, 751 S.W.2d 607, 610 (Tex.App.--Dallas 1988).

Thus, the Court of Appeals clearly and expressly states that Petitioner is procedurally barred from relief predicated upon independent and adequate state grounds. Furthermore, petitioner has failed to show "good cause" to excuse his procedural default. *Thompson*, 821 F.2d at 1082. Therefore, this Court finds that the merits of petitioner's claim are barred from consideration due to petitioner's failure to follow state procedural rules.

RECOMMENDATION

For the foregoing reason, the Court recommends that petitioner's application for habeas relief be denied.

JANE J. BOYLE
UNITED STATES MAGISTRATE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

The United States District Clerk shall serve a copy of these findings, conclusions and recommendation on all parties by mailing a copy to each of them by Certified Mail, Return Receipt Requested. Pursuant to Title 28, United States Code, Section 636(b)(1), any party who desires to object to these findings, conclusions and recommendation must file and serve written objections within ten days after being served with a copy. A party filing objections must specifically identify those findings, conclusions or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory or general objections. A party's failure to file such written objections to these proposed findings, conclusions and recommendation shall bar that party from a *de novo* determination by the District Court. *Nettles v. Wainwright*, 677 F.2d 404, 410 (5th Cir. 1982). *See Thomas v. Arn*, 474 U.S. 140, 150, 106 S.Ct. 466, 472 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation within ten days of being served with a copy shall bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court, except upon grounds of plain error or manifest injustice. *Nettles*, 677 F.2d at 410.

JANE J. BOYLE
UNITED STATES MAGISTRATE JUDGE

APPENDIX D

RONALD P. REED, Appellant,
v.
THE STATE OF TEXAS, Appellee

No. 05-86-00647-CR

Court of Appeals of Texas,
Dallas.

May 10, 1988.

E. Brice Cunningham, Dallas, for appellant.

Michael A. Klein, Dallas, for appellee.

Before WHITHAM, ROWE and THOMAS, JJ.

THOMAS, Justice.

Ronald P. Reed was convicted of aggravated sexual assault and sentenced to life imprisonment and payment of a $10,000 fine. He raises seventeen points of error, contending that: 1) the prosecutor excluded black veniremembers from the petit jury; 2) evidence of extraneous offenses was improperly admitted; 3) the trial court erred in refusing to excuse a veniremember challenged for cause; 4) testimony that complainant previously identified appellant at live and photographic lineups, and introduction of photographs into evidence, constituted improper bolstering of in-court identification; 5) testimony of a probation officer concerning appellant's out-of-state conviction was improperly admitted; and 6) the prosecutor's improper jury argument deprived appellant of a fair trial. Finding no merit in these contentions, we affirm the judgment of the trial court.

The Facts

On a Sunday afternoon in November, C.H. parked her car near the back door of her condominium in northeast Dallas. She was returning from the grocery store. She left her car, carrying her purse and the Sunday newspaper, and opened the back door of her condo. C.H. set down those items and turned to retrieve the groceries from the car. When she turned, she saw appellant before her, holding a gun. The gun was blue or black, and appellant held it waist high with his arm bent and his elbow close to his side. Appellant was neatly dressed, wearing a brown tweed jacket, white shirt and dark brown pants.

C.H. begged appellant not to hurt her. Nevertheless, he forced her into the condo and closed the door behind him. Appellant demanded money and jewelry, but refused the money C.H. gave him. Appellant asked if anyone were upstairs. C.H. told him her sister was upstairs. Appellant gestured with the gun for C.H. to go upstairs and said, "Let's go." C.H.'s sister was not home, and when they reached the upstairs bedroom, appellant again demanded C.H.'s jewelry. She started pulling out jewelry from her dresser and offered it to appellant. Appellant appeared uninterested, however, taking C.H.'s watch and placing it on the dresser.

Appellant told C.H. to remove her clothes and sit down on the bed. After she did so, he unfastened his belt and unzipped his pants. He pulled down his pants to reveal his penis, but did not remove his clothes. He put his hand behind the woman's head and forced her to perform oral sex. He threatened her, saying, "Don't bite it or I will make you--eat this gun." Appellant did not ejaculate in the complainant's mouth. He told C.H. to lie back on the bed and spread her legs. He removed his jacket and lowered his trousers. Appellant then vaginally raped C.H. She could feel the gun at her head during the rape.

After raping C.H., appellant searched C.H.'s dresser and took the rings he found. Appellant forced C.H. downstairs without allowing her to dress. Appellant asked for cash, but C.H. had only two dollars. She offered him her credit cards but he did not want them. He walked to the refrigerator and took a bottle of wine from it. Appellant took her to a half-bath and told her to sit down. He shut the door, and C.H. could hear him rummaging through things in the apartment. After a while, appellant opened the door and told her not to tell anyone about the incident, "or the next time I will come in shooting." He shut the bathroom door and C.H. stayed in the bathroom until she heard the back door close and she was convinced appellant had left. C.H. jewelry was found in appellant's apartment.

Peremptory Challenges

In his first point of error, appellant contends that the State, through its peremptory challenges, systematically excluded black veniremembers from the petit jury. The fourteenth amendment to the constitution forbids the prosecutor to challenge potential jurors solely on account of their race. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 1719, 90 L.Ed.2d 69 (1986). Upon reviewing the record, we note that the entire voir dire proceedings were not recorded. The following colloquy occurred at trial:

> The Court: Do you want the court reporter to take everything, [defense counsel]?
> [Defense Counsel]: No, sir.
> The Court: No?
> [Defense Counsel]: I'm talking about the voir dire.
> The Court: You don't want her to take the voir dire?
> [Defense Counsel]: No.
> The Court: Are you sure?
> [Defense Counsel]: I'm positive, Judge, unless a question arises, we would ask that she be on hand so she could come out and take it down.
> The Court: Okay.

As defense counsel requested, the general voir dire was not recorded. Individual questioning of some panel members were recorded.

After the *Batson* hearing, the trial court concluded that appellant had presented a prima facie case of discriminatory use of peremptory challenges, but that the State had rebutted the prima facie case by presenting racially neutral reasons for its strikes. Thus, the court found that appellant had failed to establish purposeful discrimination. In reviewing these findings, we must consider the voir dire proceedings as well as the transcription of the *Batson* hearing. *See Keeton v. State*, 749 S.W.2d 861 at 863 n. 1 (Tex. Crim. App. 1988) (opinion following abatement). This Court must affirm the trial court's findings "whenever the record discloses sufficient evidence in their support." *Tompkins v. State*, --- S.W.2d ----, No. 68, 870, slip op. at 8 (Tex. Crim. App. Oct. 7, 1987).

We cannot follow the mandate of *Keeton* and *Tompkins* to review the entire voir dire proceedings when the record before us is a partial transcription of the proceedings. It is well settled that complaints as to voir dire error cannot be reviewed in the absence of a transcription of the complete voir dire examination. *See Burkett v. State*, 516 S.W.2d 147, 150 (Tex. Crim. App. 1974) (restriction of voir dire questioning unreviewable absent entire record of voir dire); *Graves v. State*, 513 S.W.2d 57, 62 (Tex. Crim. App. 1974) (prosecutor's improper remarks unreviewable absent entire record of voir dire); *Magee v. State*, 504 S.W.2d 849, 852 (Tex. Crim. App. 1974) (cannot determine whether juror improperly concealed bias in absence of entire record of voir dire); *Guerrero v. State*, 487 S.W.2d 729, 731 (Tex. Crim. App. 1972) (whether court erred in refusing to excuse five veniremen who allegedly showed bias cannot be determined in absence of transcription of voir dire). Consequently, we overrule point of error one.

Extraneous Offenses

In eight points of error, appellant contends that the trial court erred in admitting evidence of extraneous offenses. After appellant offered four alibi witnesses, the State offered as rebuttal the testimony of two women who identified appellant as the man who sexually assaulted them. Appellant contends that such evidence was inadmissible. We disagree. The general rule is that an accused may not be tried for some collateral crime or for being a criminal generally. *Williams v. State*, 662 S.W.2d 344, 346 (Tex. Crim. App. 1983). To this end, an extraneous offense is usually not admissible. Extraneous offense testimony is not, however, always inadmissible. The test for determining the admissibility of any evidence, including evidence of extraneous offenses, involves a two-step inquiry: 1) whether the evidence is relevant to a material contested issue in the case other than the defendant's character; and (2) whether the probative value of the evidence outweighs its inflammatory aspects. *Robinson v. State*, 701 S.W.2d 895, 895 (Tex. Crim. App. 1985); *Williams v. State*, 662 S.W.2d 344, 346 (Tex. Crim. App. 1983).

We will first examine the question of relevancy of the extraneous offenses to a material contested issue in this case. The identity of the accused as the wrongdoer is one of the material issues which is raised by the State's pleading an offense in any charging instrument. *Moore v. State*, 700 S.W.2d 193, 199 (Tex. Crim. App. 1985). Thus, we must determine whether identity was a contested issue in this case. In other words, the inquiry is whether appellant during the trial raised the issue of his identification. The State argues that appellant placed his identity in issue by raising the defense of alibi.

An alibi defense does not invariably create a material issue as to the accused's identity so as to justify the admission of extraneous offense testimony. *Boutwell v. State*, 719 S.W.2d 164, 172 (Tex. Crim. App. 1985); *Moore v. State*, 700 S.W.2d 193, 199 (Tex. Crim. App. 1985). In *Boutwell*, identity was not

placed in issue by the defendant's alibi because "each of the State's witnesses not only knew appellant, but knew him quite well." *Boutwell*, 719 S.W.2d at 171. The alibi evidence merely raised an issue as to the credibility of the State's witnesses. *Id.* The *Boutwell* court recognized that the rule is very different when the complainant does not know the accused: "It is true that in cases where the accused is a stranger to the State's witnesses, his evidence that he was elsewhere at the time of the offense will generally raise a material issue as to his identity as the perpetrator." *Boutwell*, 719 S.W.2d at 172 (emphasis original); *see also Mizell v. State*, 732 S.W.2d 384, 385 (Tex. App.--Houston [14th Dist.] 1987, pet. granted).

In the case at bar, C.H. testified that she had never seen her assailant before the day of the assault. Appellant's alibi defense put into issue whether C.H. had misidentified appellant as her attacker. The alibi defense raised the issue of identity in this case. Having determined that identity was a material contested issue, we turn now to whether the extraneous offenses were relevant to the issue of identity.

Extraneous offenses are relevant to the issue of identity if there are distinguishing characteristics common to both the extraneous offense and the offense for which the defendant is on trial or if there is a high degree of similarity so as to earmark them as the handiwork of the accused. *Castillo v. State*, 739 S.W.2d 280, 289 (Tex. Crim. App. 1987); *Moore*, 700 S.W.2d at 201; *Collazo v. State*, 623 S.W.2d 647, 648 (Tex. Crim. App. 1981).

It is unnecessary to detail the testimony of the other two assault victims. Suffice it to say that having described the sexual assault upon C.H., we have also described the other two. We note the following common characteristics of the three assaults: 1) all three women lived in apartment/condominium complexes in northeast Dallas; 2) appellant approached the woman after she unlocked the door while carrying something from the car; 3) appellant pushed the women into the apartment and closed the

door behind them; 4) appellant wielded a gun, holding it waist high and close to his body; 5) appellant was nicely dressed, wearing slacks, shirt and jacket; 6) appellant demanded money or jewelry upon initial entry; 7) in each case appellant asked if anyone else was in the home; 8) all three women were told to remove their clothes and sit on the bed; 9) appellant remained clothed, only dropping his trousers, in each case; 10) in each case appellant compelled the victim to engage in oral intercourse and then raped them vaginally; 11) in each case, appellant stole money and jewelry, refusing the opportunity to take credit cards; 12) the jewelry from all three women was found in appellant's apartment; 13) appellant warned all three not to tell the police; 14) in the charged offense and in one of the extraneous offenses, appellant told the victim to wait in the bathroom; and 15) in the charged offense and in one of the extraneous offenses, appellant looked through the refrigerator. We hold that these similarities make the extraneous offenses relevant to the contested identity issue.

Our second inquiry is whether the probative value of the extraneous offenses outweighs the prejudicial effect. *Robinson*, 701 S.W.2d at 895; *Williams*, 662 S.W.2d at 346. The Court of Criminal Appeals has used several factors to measure the probative value of an extraneous offense: 1) presence of similarity between the prior acts and the offense charged; 2) closeness in time of the extraneous transactions to the charged offense; and 3) availability of alternative sources of proof. *Robinson*, 701 S.W.2d at 898.

We have already noted the similarities between the charged offense and the extraneous offenses. Such close factual similarity lends substantial probative value to the extraneous transactions. See *Robinson*, 701 S.W.2d 898. In addition, the three offenses occurred within a ten-day period. Thus, the three offenses were sufficiently close in time to have provided additional probative value. *Id.*

Perhaps the most troublesome ingredient of probative value is the availability of alternative sources of proof. See *Robinson*, 701 S.W.2d at 898, *Morgan v. State*, 692 S.W.2d 877, 880 n. 4 (Tex. Crim. App. 1985). Where there is little or no controverting evidence offered by a defendant, it is clear that the use of an extraneous offense is unnecessary and offers virtually no probative value. *Prior v. State*, 647 S.W.2d 956, 959 (Tex. Crim. App. 1983). The presence of some controverting evidence, particularly when presented in the form of the defensive theory, will enhance the probative value. *Robinson*, 701 S.W.2d at 895; *Albrecht v. State*, 486 S.W.2d 97, 101 (Tex. Crim. App. 1972). The Court of Criminal Appeals considers whether the State's evidence is circumstantial or direct when examining this factor. See *Moore*, 700 S.W.2d at 198. In essence, the touchstone for probative value appears to be whether the State needs the evidence to prove its case. The greater the need for the evidence, the more likely it will be admissible. *Wells v. State*, 730 S.W.2d 782, 785 (Tex.App.--Dallas 1987, no pet.).

In this case, there was direct testimony from the complainant that appellant sexually assaulted her. However, this evidence was rebutted by appellant's alibi testimony. The four alibi witnesses presented strong testimony and were not impeached by prior convictions or otherwise. The only factor affecting their credibility was their relationship with the accused. Appellant's brother and three friends offered the alibi testimony. Further strengthening appellant's claim that C.H. had mistakenly identified him was testimony that the fingerprints found in C.H.'s apartment were not appellant's. Although the jewelry found in appellant's apartment lessens the impact of appellant's alibi defense, there was testimony that two other men lived in the apartment and had access to the bathroom drawer where the jewelry was found. Given the strength of appellant's controverting evidence, we conclude that the State had no alternative sources of proof and needed recourse to the extraneous offense evidence.

Taking into account the various factors of strong similarity, proximity in time, and a presence of strong controverting evidence in the form of a defensive theory of alibi, we hold that the extraneous offenses had probative value as to appellant's identity. We turn now to examine the prejudicial effect.

Courts have often noted the inherent prejudicial effect of using extraneous offenses. Prejudice arises "since the accused has no notice he will be called to defend against it, and his 'propensity to commit crimes' is not material to whether he is guilty of the specified conduct which is charged by the State." *Robinson*, 701 S.W.2d at 899 quoting *Williams*, 662 S.W.2d at 346). In *Robinson*, the court noted two ways in which the inherent prejudice may be lessened: 1) introduction of the evidence as a transaction rather than as a criminal offense; and 2) a proper instruction on the limited use of an extraneous offense.

In *Robinson*, a theft case involving an attorney keeping client property, the extraneous offense also involved the retention of client funds. Such action could be presented to the jury as a transaction rather than as a criminal offense. Further, appellant, through cross-examination, made it clear that no civil or criminal action had resulted from the transaction. In *Plante v. State*, 692 S.W.2d 487 (Tex. Crim. App. 1985), the charged offense was theft by deception and the extraneous transactions involved similar credit transactions where payment was never received.

Clearly, the extraneous offenses in *Robinson* and *Plante* could be presented in a non-criminal context. Obviously, the same cannot be said for the two sexual assaults involving deadly weapons presented in this case. The court noted in *Plante* and *Robinson*, however, that the State's jury argument was noninflammatory and that the State did not attempt to brand the accused as a criminal in general. *Robinson*, 701 S.W.2d at 899; *Plante*, 692 S.W.2d at 494. In the case at bar, the State limited its discussion of the extraneous assaults to their tendency to

prove identity. We conclude that the State's noninflammatory jury argument lessened the prejudicial impact of the extraneous transactions.

The court's charge to the jury contained a proper instruction limiting the jury's consideration of the extraneous offenses to the issue of identity. This instruction lessened the prejudicial effect of the extraneous offenses. *Robinson*, 701 S.W.2d at 899.

Taking into account the noninflammatory jury argument and the proper limiting instruction, we conclude that the prejudicial effect of the extraneous offenses in this case was relatively low. Given the high probative value of the evidence and its lower prejudicial effect, we hold that the extraneous offense evidence was properly admitted in this case. Points of error two through nine are overruled.

Challenge for Cause

In his tenth point of error, appellant contends that the trial court erred in refusing to excuse a veniremember upon appellant's challenge for cause. In order to obtain a reversal of a conviction on appeal with respect to a challenge for cause, the complaining party must show: 1) an erroneous ruling by the trial court on a challenge for cause, 2) an exhaustion of his peremptory challenges, and 3) evidence that an objectionable juror actually sat on the case. *Powers v. State*, 497 S.W.2d 594, 595 (Tex. Crim. App. 1973); *Johnson v. State*, 713 S.W.2d 741, 744 (Tex. App.--Dallas 1986, pet. ref'd).

In this case, the jury strike list shows that appellant utilized only nine of his ten allowed peremptory challenges. Thus, appellant has failed to carry his burden of establishing prejudice from the alleged error or refusing his challenge for cause. *Sharp v. State*, 707 S.W.2d 611, 622 (Tex. Crim. App. 1986); *East v. State*, 702 S.W.2d 606, 611 (Tex. Crim. App.

1985). Consequently, we overrule appellant's tenth point of error.

Bolstering Identification Testimony

In points of error eleven, twelve and thirteen, appellant complains of improper bolstering of the complainant's in-court identification. C.H. identified appellant in the courtroom as the man who raped her. She also testified concerning two photographic lineups conducted by the police. Appellant's photograph was not included in the first lineup and C.H. told the police that her attacker was not pictured. She further testified that she identified appellant in a second photographic lineup. The police officer who conducted the lineups testified only that he showed the photographs to C.H. He did not testify that C.H. identified appellant's photograph.

It is well settled that the State cannot call other witnesses to bolster the testimony of an unimpeached witness. *Lyons v. State*, 388 S.W.2d 950, 951 (Tex. Crim. App. 1965). However, no bolstering occurs when a witness who identifies a defendant at trial also testifies that he identified the defendant in a pretrial lineup. *Wyatt v. State*, 566 S.W.2d 597, 601 (Tex. Crim. App. 1978); *Sanders v. State*, 688 S.W.2d 676, 679 (Tex. App.--Dallas 1985, pet. ref'd); *Lewis v. State*, 631 S.W.2d 813, 815 (Tex. App.--Fort Worth 1982, no pet.). Thus, C.H.'s testimony did not constitute improper bolstering.

We also conclude that the police officer's testimony did not constitute improper bolstering. Because he did not testify that the complainant had identified appellant's photograph, his testimony did not bolster C.H.'s testimony that she identified appellant in a pretrial lineup. *Sanders*, 688 S.W.2d at 679; *Hastings v. State*, 641 S.W.2d 332, 334 (Tex. App.--Dallas 1982, pet. ref'd). Accordingly, we overrule points of error eleven, twelve and thirteen.

Proof of Prior Conviction

In points of error fourteen and fifteen, appellant contends that the trial court erred in admitting Shirley Griffin's testimony because: 1) appellant was not allowed to voir dire the witness outside the presence of the jury; and 2) the witness' testimony was based on hearsay.

At the punishment stage, Shirley Griffin, a probation officer, testified concerning appellant's two prior convictions in Indiana. She testified that appellant was convicted of conversion, a misdemeanor, in Monroe County, Indiana on April 5, 1983. Although she was not present in court when he was convicted, she met him that day at LaPorte County, Indiana, when his Monroe County probation was transferred to LaPorte County. Pursuant to the probation, appellant reported to her on a regular basis. On October 7, 1983, appellant was convicted of the felony offense of conspiracy to commit robbery in LaPorte County, Indiana.

Appellant first contends that the trial court erred in refusing him the opportunity to question the witness outside the presence of the jury. The court agreed to a hearing outside the presence of the jury at which the State summarized what it expected Griffin's testimony to be about the conversion conviction. Appellant objected to such testimony because Griffin was not present in court when he was convicted. The court overruled the objection.

We reiterate that the court held a hearing to determine the admissibility of Griffin's testimony. Appellant's complaint is that he was not allowed to call Griffin to testify during the hearing. We note, however, that the State and appellant both summarized for the court what Griffin's testimony would be. In fact, her trial testimony was exactly as described at the hearing. The trial court enjoys broad discretion in the conduct of the trial and the questioning of witnesses. *Suiter v. State*, 165 Tex.Cr.R. 578, 310 S.W.2d 81, 82 (1958) (trial court did not abuse

discretion in refusing request to voir dire witness outside jury's presence). We hold that the trial court did not abuse its discretion in choosing to determine the admissibility of Griffin's testimony based upon offers of proof rather than upon live testimony of the witness.

Appellant next argues that Griffin's testimony as to the conversion conviction was inadmissible because it was based on hearsay. At trial, appellant objected based upon the best evidence rule. Appellant's trial objection does not comport with his point of error on appeal; consequently, nothing is preserved for review. *Euziere v. State*, 648 S.W.2d 700, 703 (Tex. Crim. App. 1983). We overrule points of error fourteen and fifteen.

Reputation Evidence

In his sixteenth point of error, appellant contends that Griffin's testimony as to his reputation was improper because she was not familiar with appellant's reputation at a time close to trial.[1] Griffin testified that she had known appellant since April 5, 1983. She saw him last on March 29, 1985, when his probation was discharged. She last discussed his reputation on that day, having talked to six people who knew appellant through his employment, his school, and through local law enforcement agencies. His reputation for being peaceful and law abiding was bad.

The prior character of a defendant for being peaceful and law abiding is some evidence of what his present character is. Thus, testimony regarding prior character is admissible if it is not so remote as to have no probative value in indicating present character. *Nethery v. State*, 692 S.W.2d 686, 706 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1110, 106 S.Ct. 897, 88 L.Ed.2d 931 (1986). The question of remoteness rests in the discretion of the trial court. *Id.* at 706; *Davis v. State*, 545

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[1] We note that appellant does not contend that reputation evidence was inadmissible per se.

S.W.2d 147, 150 (Tex. Crim. App. 1976). In *Nethery*, the reputation witness testified that the defendant's reputation in his hometown was bad. The defendant had left his hometown two or three years before the trial. The court held that the trial court had not abused its discretion. *Nethery*, 692 S.W.2d at 706.

In the case at bar, the trial commenced April 7, 1986. Griffin was familiar with appellant's reputation through March 29, 1985, only one year and nine days prior to trial. We hold that the reputation evidence was not so remote as to have no probative value. Appellant has shown no abuse of discretion. Point of error sixteen is overruled.

Jury Argument

In his seventeenth, and final, point of error, appellant complains of improper jury argument. At the punishment stage, the prosecutor argued: "I would like to think that in this day and age when just about every time you pick up a newspaper or you turn the television on, you see some massive, horrendous, bloody offense...." Appellant objected that the argument was outside the record and the trial court sustained the objection. Pursuant to appellant's request, the trial court instructed the jury to disregard the remark. Appellant moved for mistrial and the motion was denied.

When an argument exceeds the scope of proper argument, it will not constitute reversible error unless, in light of the record as a whole, the argument is extremely or manifestly improper, violative of a mandatory statute, or injects into the trial new facts harmful to the accused. *Dickinson v. State*, 685 S.W.2d 320, 322 (Tex. Crim. App. 1984). Ordinarily, any injury from improper jury argument is obviated when the court instructs the jury to disregard, unless the remark is so inflammatory that its prejudicial effect cannot reasonably be removed by such an admonishment. *McKay v. State*, 707 S.W.2d 23, 37 (Tex. Crim. App. 1985); *Brown v. State*, 692 S.W.2d 497, 502 (Tex. Crim. App. 1985).

In light of the trial court's prompt instruction to disregard, we conclude that error, if any, was rendered harmless. Viewing the record as a whole, we hold that the statement was not so inflammatory that the jury was unable to disregard it when instructed to do so by the court. Point of error seventeen is overruled.

Having considered and overruled appellant's seventeen points of error, we affirm the judgment of the trial court.

(2)

Supreme Court, U.S.
FILED
MAR 12 1996
CLERK

No. 95-1305

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

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GARY L. JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Petitioner,

V.

RONALD P. REED,
Respondent,

----------§----------

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

----------§----------

BRIEF FOR THE RESPONDENT IN OPPOSITION

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12 pp

QUESTION PRESENTED

WHETHER THE FIFTH CIRCUIT COURT OF APPEALS CORRECTLY DETERMINED THAT THE PROCEDURAL RULE RELIED UPON BY TEXAS COURT OF APPEALS IN REFUSING TO REACH BATSON CLAIM ON GROUND THAT DEFENDANT FAILED TO PROVIDE COMPLETE VOIR DIRE TRANSCRIPT WAS NOT ADEQUATE TO SUPPORT COURTS' JUDGMENT AND PRECLUDE FEDERAL HABEAS REVIEW OF BATSON CLAIM ON GROUND OF PROCEDURAL DEFAULT, WHERE RULE WAS NOT FIRMLY ESTABLISHED AT TIME IT WAS APPLIED; RATHER, COURT OF APPEALS DECISION WAS THE FIRST REPORTED DECISION IN WHICH A TEXAS APPELLATE COURT REFUSED TO REACH A BATSON CLAIM BECAUSE DEFENDANT FAILED TO PROVIDE COMPLETE VOIR DIRE TRANSCRIPT?

TABLE OF CONTENTS

page

QUESTION PRESENTED.....i

TABLE OF AUTHORITIES.....iii

STATEMENT OF THE CASE.....2

REASONS FOR DENYING THE WRIT.....3

REVIEW IS UNWARRANTED BECAUSE THE DECISION OF THE FIFTH CIRCUIT COURT WAS CORRECT. IT DOES NOT CONFLICT WITH A DECISION OF THIS COURT OR ANY CIRCUIT COURT OF APPEALS.....4

A. THE SWAIN CASES USED AS AUTHORITY BY THE PETITIONER ARE DISTINGUISHABLE [ie. do not apply], TO BATSON CLAIMS WHERE THERE IS ADDITIONAL RECORDS AVAILABLE TO THE COURTS FOR REVIEW SUCH AS THE BATSON HEARING TRANSCRIPT WHICH CAN PROVIDE A " SUFFICIENTLY COMPLETE RECORD TO DEMONSTRATE ERROR ", THUS PROVIDING A CLEAR BREAK FROM THE PAST.....5

B. THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT REED IS THE FIRST REPORTED DECISION IN WHICH A TEXAS APPELLATE COURT REFUSED TO REACH A BATSON CLAIM BECAUSE THE DEFENDANT FAILED TO PROVIDE A COMPLETE VOIR DIRE TRANSCRIPT.....6

CONCLUSION.....8

TABLE OF AUTHORITIES

PAGE

Cases

Amos v. Scott, 61 F.3d 33, at 339
(emphasis in original) (5th Cir. 1995).....3,6

Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991)....6

Batson v. Kentucky, 476 U.S. 79,
106 S. Ct. 1712, 90 L.Ed. 2d 69 (1986)...passim

Davis v. State, 478 S.W.2d 958 (Tex. Crim. App. 1972).....5

Ford v. Georgia, 498 U.S. 411
111 S.Ct. 2590, 115 L.Ed.2d 706 (1991).....3,4

Gaines v. State, 479 S.W.2d 678, 679
(Tex. Crim. App. 1972).....5

Harris v. State, 656 S.W.2d 481, 486
(Tex. Crim. App. 1983).....5

Mckinney v. State, 744 S.W.2d 252, 256
(Tex. App.--Waco 1987, no pet.).....6,7

Reed v. Scott, 70 F.3d 844 (5th Cir. 1995).....4

Reed v. State, 751 S.W.2d 607
(Tex. App. Dallas. 1988, no pet.).....7

Reese v. State, 481 S.W.2d 841, 842
(Tex. Crim. App. 1983).....5

Swain v. Alabama, 380 U.S. 202 (1965).....5

Rules

Tex. R. App. Proc. 50(d).....8

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES RONALD P. REED, RESPONDENT, PROCEEDING PRO SE, HEREINAFTER REFERRED TO AS RESPONDENT REED, AND FILES THIS BRIEF FOR THE RESPONDENT IN OPPOSITION.

STATEMENT OF THE CASE

IN 1986 RESPONDENT REED WAS CONVICTED IN DALLAS TEXAS STATE COURT OF AGGRAVATED SEXUAL ASSAULT AND SENTENCED TO LIFE IN PRISON. RESPONDENT REEDS' CONVICTION WAS AFFIRMED ON DIRECT APPEAL. REED v. STATE, 751 S.W. 2d 607 (Tex. App. --Dallas 1988, no pet.) IN AFFIRMING THE CONVICTION THE COURT OF APPEALS DECLINED TO REACH THE MERITS OF THE BATSON CLAIM BECAUSE RESPONDENT REED FAILED TO PROVIDE A COMPLETE TRANSCRIPT OF THE VOIR DIRE EXAMINATION. THE COURT OF APPELS BASED ITS CONCLUSION ON THE "WELL SETTLED [rule] THAT COMPLAINTS AS TO VOIR DIRE ERROR CANNOT BE REVIEWED IN THE ABSENCE OF A TRANSCRIPTION OF THE COMPLETE VOIR DIRE EXAMINATION." A COMPLETE TRANSCRIPTION OF THE VOIR DIRE EXAMINATION DOES NOT EXIST BECAUSE RESPONDENT REEDS' COUNSEL INFORMED THE TRIAL COURT THAT HE DID NOT DESIRE THE COURT REPORTER TO MAKE SUCH A RECORD. THE QUESTIONING OF SOME PANEL MEMBERS, HOWEVER, WAS RECORDED AND THERE IS A TRANSCRIPT OF THE BATSON HEARING. RESPONDENT REED DID NOT FILE A PETITION FOR DISCRETIONARY REVIEW BY THE COURT OF CRIMINAL APPEALS BUT, RATHER, FILED A STATE PETITION FOR THE WRIT OF HABEAS CORPUS IN ACCORDANCE WITH TEX. CODE CRIM. PROC. ANN. ART. 11.07, ALLEGING THE BATSON CLAIM. THE COURT OF CRIMINAL APPEALS DENIED THE PETITION WITHOUT WRITTEN ORDER. HAVING FULLY EXHAUSTED HIS STATE REMEDIES, RESPONDENT REED FILED THE INSTANT PETITION FOR THE WRIT OF HABEAS CORPUS ADVANCING THE BATSON CLAIM.

THE PETITION WAS REFERRED TO A MAGISTRATE JUDGE WHO ISSUED A REPORT AND RECOMMENDATION CONCLUDING THAT THE PETITION SHOULD BE DENIED BECAUSE RESPONDENT REED PROCEDURALLY DEFAULTED ON THE BATSON CLAIM. THE DISTRICT COURT ADOPTED THE REPORT AND RECOMMENDATION AND DENIED THE PETITION. RESPONDENT REED FILED A MOTION FOR CPC WHICH WAS GRANTED BY THE FIFTH CIRCUIT. ON APPEAL THE FIFTH CIRCUIT REVERSED AND REMANDED FOR CONSIDERATION OF THE MERITS OF THE BATSON CLAIM. THE FIFTH CIRCUIT FOUND THAT THE STATE COURTS' INVOCATION OF A PROCEDURAL BAR WAS NOT ENTITLED TO THE RESPECT OF A FEDERAL HABEAS COURT BECAUSE IT WAS NOT "FIRMLY ESTABLISHED AND REGULARLY FOLLOWED" AT THE TIME IT WAS APPLIED.

REASONS FOR DENYING THE WRIT

THE FIFTH CIRCUIT COURT OF APPEALS PROPERLY DETERMINED THAT STATE PROCEDURAL RULE RELIED ON BY THE COURT OF APPELS IN REED IS INADEQUATE. ALL OF THE CIRCUIT COURTS, INCLUDING THE FIFTH CIRCUIT, AGREE THAT A STATE PROCEDURAL RULE IS ADEQUATE ONLY IF IT WAS FIRMLY ESTABLISHED AT THE TIME IT WAS APPLIED. FORD v. GEORGIA, 498 U.S. 411, 11 S.Ct. 850, 112 L.Ed.2d 935 (1991)... MOREOVER, IT MUST BE "STRICTLY OR REGULARLY FOLLOWED BY THE COGNIZANT STATE COURT...[and] STRICTLY OR REGULARLY APPLIED **evenhandedly to the vast majority of similar claims.**" AMOS v. SCOTT, 61 F.3d 333 at 339 (emphasis in original), (5th Cir. 1995)

IN ADDITION, THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT REED IS THE FIRST REPORTED DECISION IN WHICH A TEXAS APPELLATE COURT REFUSED TO REACH A BATSON CLAIM BECAUSE THE DEFENDANT FAILED TO PROVIDE A COMPLETE VOIR DIRE TRANSCRIPT.

AS SUCH, THE COURT OF APPEALS' REFUSAL TO REACH REEDS' BATSON CLAIM DUE TO HIS FAILURE TO PROVIDE A COMPLETE VOIR DIRE TRANSCRIPT "DOES NOT EVEN REMOTELY SATISFY THE REQUIREMENT... THAT AN ADEQUATE AND INDEPENDENT STATE PROCEDURAL BAR TO THE ENTERTAINMENT OF CONSTITUTIONAL CLAIMS MUST HAVE BEEN 'FIRMLY ESTABLISHED OR REGULARLY FOLLOWED' BY THE TIME" IT WAS APPLIED. REED v. SCOTT, 70 F.3d 844 (5th Cir. 1995), FORD v. GEORGIA, 498 U.S. at 424, 11 S.Ct. at 857-58.

REVIEW IS UNWARRANTED BECAUSE THE DECISION OF THE FIFTH CIRCUIT COURT WAS CORRECT. IT DOES NOT CONFLICT WITH A DECISION OF THIS COURT OR ANY CIRCUIT COURT OF APPEALS...

A. THE SWAIN, CASES, SWAIN v. ALABAMA, 380 U.S. 202 (1965), USED AS AUTHORITY BY THE PETITIONER ARE DISTINGUISHABLE [ie. do not apply], TO BATSON CLAIM WHERE THERE IS ADDITIONAL RECORDS AVAILABLE TO THE COURTS FOR REVIEW, SUCH AS, THE BATSON HEARING TRANSCRIPT WHICH CAN PROVIDE A "SUFFICIENTLY COMPLETE RECORD TO DEMONSTRATE ERROR", THUS PROVIDING A CLEAR BREAK FROM THE PAST...

SPECIFICLY, IN REESE v. STATE, 481 S.W.2d 841,842 (Tex. Crim. App. 1972), THE COURT REFUSED REVIEW OF A SWAIN CLAIM BECAUSE "[t]he VOIR DIRE EXAMINATION OF THE JURY PANEL IS NOT INCLUDED IN THE RECORD NOR DOES THE RECORD REFLECT A REQUEST THAT SUCH VOIR DIRE EXAMINATION BE TAKEN BY THE COURT REPORTER." IN HARRIS v. STATE, 656 S.W.2d 481,486 (Tex. Crim. App. 1983) (REFUSING TO REACH MERITS OF CLAIM THAT BLACKS WERE IMPROPERLY EXCLUDED FROM JURY BECAUSE DEFENDANTS' BRIEF WAS INADEQUATE AND BECAUSE "THE RECORD CONTAINS NO INDICIA IN ANY FORM OF THE RACIAL COMPOSITION OF THE JURY"): GAINES v. STATE, 479 S.W.2d 678, 679 (Tex. Crim. App. 1972) (REFUSING REVIEW OF SIMILAR CLAIM BECAUSE "[t]here IS NOTHING IN THE RECORD, NEITHER BY INCLUSION OF THE JURY SELECTION LIST SHOWING THE PEREMPTORY CHALLENGES NOR BY A FORMAL BILL OF EXCEPTIONS OR BY ANY OTHER METHOD TO SUSTAIN THIS CONTENTION"); DAVIS v. STATE, 478 S.W.2d 958,959 (Tex. Crim. App. 1972) (REFUSING REVIEW OF SIMILAR CLAIM BECAUSE "[t]he RECORD WAS NOT DEVELOPED ON THIS GROUND OF ERROR AND NOTHING IS PRESENTED FOR REVIEW").

THE CASES RELIED UPON BY PETITIONER DO NOT CONTROL THE RESOLUTION OF THIS MATTER BECAUSE THE COURT MUST FOCUS ON THE APPLICATION OF THE BAR IN THE CONTEXT OF A BATSON CLAIM. IN ORDER TO DETERMINE THE ADEQUACY OF A PROCEDURAL BAR THE COURT MUST EMPHASIZE THE APPLICATION OF THE BAR TO THE SPECIFIC CONSTITUTIONAL CLAIM AT ISSUE. AMOS v. SCOTT, 61 F.2d 333 see also ANDREWS v. DELAND, 943 F.2d 1162, 1190 (10th Cir. 1991)

B. THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT REED IS THE FIRST REPORTED DECISION IN WHICH A TEXAS APPELLATE COURT REFUSED TO REACH A BATSON CLAIM BECAUSE THE DEFENDANT FAILED TO PROVIDE A COMPLETE VOIR DIRE TRANSCRIPT.

THE PETITIONER ASSERTS THAT THIS IS NOT THE CASE, THAT SOME FIVE MONTHS BEFORE REED IN MCKINNEY v. STATE, 744 S.W.2d. 252,256 (Tex. App.--Waco 1987, no pet.) THE APPELLATE COURT REFUSED TO REACH A BATSON CLAIM BECAUSE THE DEFENDANT FAILED TO PROVIDE A COMPLETE VOIR DIRE TRANSCRIPT. A CLOSE EXAMINATION OF THIS CASE USED AS AUTHORTY BY THE PETITIONER REVEALS THAT: "IN MCKINNEY THE APPELLATE RECORD DOES NOT CONTAIN A LIST OF THE PROSPECTIVE JURORS, ANY PERSONAL-HISTORY SHEETS FILLED OUT BY THE JURORS, PRIOR TO VOIR DIRE, OR A LIST OF THE PARTIES STRIKES. FURTHERMORE, THE TRANSCRIPTION OF VOIR DIRE DOES NOT REFLECT THE NUMBERS ASSIGNED TO MEMBERS OF THE PANEL, THEIR RACE OR SUFFICIENT PERSONAL INFORMATION ABOUT THE JURORS QUESTIONED THAT WOULD BE ESSENTIAL TO REVIEW THE RULING ON APPELLANTS' OBJECTION".

THE RESPONDENT REED HAS PROVIDED TO THE COURT [a]11 EACH AND EVERY PORTION OF THE RECORD THAT MCKINNEY WAS UNABLE TO INCLUDE IN THE RECORD ON APPEAL. NAMELY: LIST OF THE PROSPECTIVE JURORS, PERSONAL-HISTORY SHEETS, LIST OF THE PARTIES STRIKES, AND THE TRANSCRIPTION OF VOIR DIRE REFLECTING THE NUMBERS ASSIGNED TO MEMBERS OF THE PANEL, THEIR RACE OR SUFFICIENT PERSONAL INFORMATION ABOUT THE JURORS QUESTIONED THAT WOULD BE ESSENTIAL TO REVIEW THE RULING ON OBJECTION. SEE (HEARING ON MOTIONS INDIVIDUAL QUESTIONS OF VOIR DIRE VOLUME II OF V VOLUMES, p.93, thru p.102) SEE ALSO (STATEMENT OF FACTS VOL. I OF V HEARING UNDER THE STANDARDS OF BATSON p.7-9), SEE ALSO (JUROR INFORMATION CARDS DEFENSE EXHIBITS (A), AND (B) FROM THE BATSON HEARING).

TEXAS LAW PRECLUDES REVIEW OF AN ALLEGED VOIR DIRE ERROR IF THE DEFENDANT FAILS TO PROVIDE A SUFFICIENT RECORD FROM WHICH THE COURT MAY DISCERN SUCH ERROR RATHER THAN ABSOLUTELY PRECLUDING REVIEW OF AN ALLEGED VOIR DIRE ERROR ABSENT A COMPLETE TRANSCRIPTION OF THE VOIR DIRE EXAMINATION. MCKINNEY WAS UNABLE TO PROVIDE THE COURTS WITH A RECORD "SUFFICIENTLY COMPLETE TO DEMONSTRATE ERROR". RESPONDENT REED HAS PROVIDED THE COURTS WITH ALL THE INTEGRAL COMPONENTS OF A BATSON CLAIM AS A MATTER OF SUBSTANTIAL FEDERAL LAW. HEARING ON MOTIONS INDIVIDUAL QUESTIONS OF VOIR DIRE, QUESTIONING OF SOME PANEL MEMBERS, AND THE TRANSCRIPT OF THE BATSON HEARING.

THUS PROVIDING THE COURT WITH A RECORD THAT IS "SUFFICIENTLY COMPLETE TO DEMONSTRATE ERROR". Tex. R. App. Proc. 50(d) FURTHER CONTENTING THAT RESPONDENT REED IS THE FIRST REPORTED DECISION IN WHICH A TEXAS APPELLATE COURT REFUSED TO REACH A BATSON CLAIM BECAUSE THE DEFENDANT FAILED TO PROVIDE A COMPLETE VOIR DIRE TRANSCRIPT...

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CONCLUSION

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

RESPECTFULLY SUBMITTED,

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MICHAEL UNIT TEXAS DEPARTMENT
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